

Owners Beware: Failure to Strictly Comply with Prompt Pay Act May Cost You

Owners and their project representatives need to strictly adhere to the Massachusetts Prompt Payment Act's requirements or risk losing their right to dispute payments to contractors, according to a new Superior Court decision. In *Tocci Building Corp. v. IRIV Partners, LLC et al.* (Nov. 19, 2020, Super. Ct. No. 19-405), the Court clarified the contractor's remedy for Owner violations of the Prompt Payment Act (the "Act"), G. L. c. 149, § 29E, in this case the failure to respond to payment applications according to the Act's required procedures.

On projects where the general contract value is \$3 million or more, the Act requires owners and contractors to respond to payment applications from lower-tier contractors and subcontractors and/or make payment within specified time periods. Any objection to payment also must be made within those time periods, supported in writing by a factual basis and certified as having been made in good faith. Where an owner/upper tier contractor fails to comply with the required deadlines, the requisitions in question are deemed accepted.

Absent from the language of the Act, however, is any mention of a specific remedy to the contractor (or penalty to the owner or upper-tier contractor) for violations of the payment terms. Since the Act was enacted in 2010, there has been little or no guidance on how it might be enforced or what the remedies would be—until now.

At issue in *Tocci* were 7 separate progress payments the contractor issued over 6 months totaling over \$4.6 million, on a project involving the construction of commercial laboratory space in Boston's Seaport District. The Owner's project manager responded to all of the requisitions within the required timeframes by email and letter, but did not follow the letter of the Act. That is, the Owner's responses "did not specifically reject a Requisition in dispute, did not include an explanation of the factual and contractual basis for the rejection, and did not include a certification that the rejection was made in good faith." As a result, even though the Owner in fact had legitimate grounds to reject the payments, because of its failure to strictly follow the Act's procedure, "whatever objections [the Owner] may have had under the Contract to the Requisitions were waived," and the Requisitions were "deemed to be approved." The Court then took the unusual step of entering a separate judgment for the contractor with respect to the payments at issue, reasoning that the Act's policy of ensuring timely contractor payment would be thwarted if *Tocci* had to wait for the rest of the case to be resolved to get paid.

The decision will almost certainly be appealed, but assuming it holds, there are two big takeaways for Owners and contractors alike. First, the Act, once thought to be toothless due to its lack of explicit enforcement provisions, now has judicial remedies—and severe ones at that. To wit, failure to comply strictly with the deadlines and requirements for disputing downstream payments will result in a complete waiver of claims, and leave you liable for the full amount of payment just as if you had accepted the requisition in full. Notably, the *Tocci* court did not carve out exceptions, even for procedural billing issues, so paying parties conceivably could be on the hook for double-billed or improperly invoiced work, further increasing their exposure. Second—and this takeaway simply follows from the first—all parties to construction contracts on covered projects (\$3 million+ at the prime contract level) need to familiarize themselves with the details of the Act's payment provisions and ensure they have the personnel and procedures in place to timely process requisitions in strict compliance with their requirements.